

October 25, 2005

H.E. Mr. Sun Zhenyu
Ambassador
Permanent Mission of the People's Republic of China
to the World Trade Organization
Route de Lausanne 228
1292 Chambésy
Switzerland

Dear Mr. Ambassador:

The United States welcomes and appreciates China's ongoing efforts to inform WTO Members about its enforcement of intellectual property rights ("IPR"). In the interest of facilitating further transparency, my authorities have instructed me to request clarifications regarding specific cases of IPR enforcement that China has identified for the years 2001 through 2004, and other relevant cases. We make this request pursuant to Article 63.3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement").

We recognize China's progress toward greater transparency in this area. In particular, China has identified numbers of specific judicial decisions and administrative rulings ("cases") reflecting the application of criminal, administrative, and civil remedies for IPR infringement in various public statements (such as the April 2005 State Council paper on China's IPR protection). We consider that these cases identified by China and other specific IPR enforcement cases affect rights of the United States and other Members under the TRIPS Agreement.

The goal of this request is to further enhance our understanding of IPR enforcement in China by clarifying and building upon information that China provided in the April 2005 paper and in other contexts, including TRIPS Council reviews. While this information has been helpful, it has come largely in the form of aggregate numbers that do not disclose the disposition of cases by legal basis, region, industry sector, or right holder nationality. Through this request, we hope to encourage the sharing of such information and thus gain a better understanding of such key features of IPR cases in China as the legal basis on which they have been decided and the remedies actually imposed on infringers.

With that goal in mind, I am attaching to this letter a list of six clarifications requested by my government concerning the specific cases identified by China for the years 2001 through 2004, as well as any comparable cases that China may have identified for that period or during 2005.

We understand that there may be a need for flexibility in connection with a request of this nature, given the scope of the issue and variations in the ways that governments and agencies collect information. In the event that any of the requested information does not exist or cannot

be provided, we would welcome the opportunity to discuss those difficulties and work together to examine alternatives. In addition, for greater convenience, we invite China to consider providing clarifications in the form of supplemental statistical data covering each of the areas listed in the attachment, rather than on a case-by-case basis.

The United States requests that China provide its written response on or before January 23, 2006. If additional time is needed to provide any requested information, I invite you to contact me so that we may reach some understanding. We look forward to receiving your reply.

Sincerely,

Peter F. Allgeier
Ambassador

cc: H.E. Mr. Choi Hyuck, Chairman, Council for TRIPS

Clarifications Requested by the United States
Concerning IPR Enforcement in Specific Cases in China

We would appreciate clarification of the following details with respect to the identified cases:¹

1. Legal Basis: To enhance our understanding of the various cases that China has identified as reflecting the application of remedies for IPR infringement, please identify the precise legal basis for any finding of IPR infringement(s) in the identified cases.² Please clarify how many of the identified matters were resolved on a basis other than IPR infringement (e.g., violation of a licensing measure, illegal business operations, fake and shoddy goods, pornography, or other basis).
2. Remedies, Provisional Measures, and Repeat Infringers: To our knowledge, China has not previously provided comprehensive information about remedies (e.g., criminal penalties, civil damages, injunctions ordering parties to desist from infringements) and provisional measures (e.g., to prevent an infringement or preserve relevant evidence) that its authorities have imposed in judicial and administrative IPR infringement cases. Please clarify the precise nature and amount of all the remedies and provisional measures imposed, if any, in the identified cases.³ In addition, please provide any information that would assist in identifying matters that involved one or more repeat infringers.
3. Location, Year, and Competent Authority: China has sometimes provided information on IPR enforcement matters broken down by location, year, and competent authority. (Examples include the 2004 statistics published by the National Copyright Administration and the annual report on China's trademarks by the State Administration for Industry and Commerce.) We find this helpful, and request similar clarification for each of the identified cases. In particular, we request the name of the authorities responsible for handling and resolving the matter;⁴ the year in which the matter was commenced and resolved; and the province, municipality, region, or other subdivision in which the matter was handled.⁵
4. Transfer of Cases to Criminal Authorities: China has previously informed the TRIPS Council of the aggregate numbers of trademark and copyright cases transferred to criminal authorities for certain years. Please provide the details of these and any other identified cases that involved transfers to criminal authorities. In particular, please identify the transferring authority (e.g., Copyright Administration, Ministry of Culture, Administration for Industry and Commerce, customs), the amount of illegal business volume and illegal gains, and whether criminal authorities in fact investigated and prosecuted.⁶
5. Nationals of Other Members/Countries: We note that China has provided some statistics that separately identify cases involving foreigners.⁷ For all of the identified cases where such information exists, please clarify whether the right holders are nationals of other WTO Members or other countries, and if possible identify the Member/country.⁸
6. Product: We would appreciate clarification of the specific type(s) of product(s) and operations (retail/manufacturing/distribution) involved in all of the identified cases where such information exists.⁹

NOTES:

¹ By “the identified cases,” we mean the specific cases that China itself has previously identified through statistics as reflecting its application of criminal, administrative, and civil remedies for IPR infringement in China for the years 2001 through 2004. *See, e.g.*, State Council Information Office, New Progress in China’s Protection of Intellectual Property Rights, April 25, 2005, available at <http://www.china-un.ch/eng/bjzl/t193102.htm> (referring to, among others, (a) administrative cases of copyright infringement; (b) administrative cases of trademark infringement and counterfeiting; (c) IPR-related civil cases of first instance and criminal cases of first instance involving IPR infringement; and (d) cases of IPR infringement in import and export handled by Chinese customs); Transitional Review under Section 18 of the Protocol on the Accession of the People’s Republic of China, IP/C/34, paras. 6, 52-55, 62, and 75-76 (December 9, 2004) (also identifying cases); Transitional Review under Section 18 of the Protocol on the Accession of the People’s Republic of China, IP/C/31, paras. 49, 54, 56 (December 10, 2003) (same); Review of Legislation, IP/Q/CHN/1, section I.C (Dec. 10, 2002) (same).

To the extent that China has also identified comparable cases in 2005, or any additional concluded or pending IPR cases that reflect the application of criminal, administrative, and civil remedies during 2001-2004, we would also appreciate clarification of the details of those cases. For purposes of this request, please treat any such cases as part of “the identified cases.”

² For criminal cases, please clarify the specific article(s) of the Criminal Law that the defendant was charged with violating, and whether the defendant was convicted of that charge. For civil or administrative matters, please clarify the infringement(s) found according to the relevant specific provisions of law. (For example, in copyright matters, please refer if possible to the specific sub-paragraph(s) of Article 46 the Copyright Law, Article 47 the Copyright Law, or both.) The goal of this request is to understand the correspondence, if any, between the categories of cases that China has previously identified (for example, the category of cases “involving” trademark or copyright infringement) and the relevant provisions of China’s law.

³ Please refer to the following categories as relevant: (a) the amount and value of infringing product confiscated and the disposition of confiscated products (*e.g.*, amounts destroyed, resold, turned over to the right holder, given to charitable organizations etc.); (b) the amount of materials and implements confiscated (*e.g.*, because of their use in the creation of infringing goods) and the disposition of those materials and implements (*e.g.*, amounts destroyed, resold, given to charitable organizations, etc.); (c) the amount of monetary fine, restitution, and/or damages imposed; (d) the term of imprisonment imposed; (e) any other remedy imposed (*e.g.*, closure of business, including length of closure; public apologies); (f) the amount of any enhancement of remedies imposed on repeat infringers; and (g) any injunction ordering the infringer or others to desist from an infringement or related activity, whether imposed under Article 49 of the Copyright Law, Article 57 of the Trademark Law, or any other relevant provision of law. Please also clarify whether the remedy was actually imposed or was suspended, reversed, modified, or for other reasons not fully executed.

⁴ Wherever possible, please refer to the specific authority involved (*e.g.*, the Beijing Municipal People’s Procuratorate). For matters resolved by courts, please refer to the court and division.

⁵ If such information exists, please provide, or explain how one can obtain from public records, a list of the identified cases for each authority and jurisdiction.

⁶ By “details,” we also mean to include the various information requested in items 1-3 and 5-6. In particular, please provide information on the offense charged and convicted; the scope of operations (retail/manufacturing/distribution); involvement of foreign right holders (and if so whose); whether right holders were informed of these criminal cases, and penalties imposed (including any civil compensation).

⁷ For example, this was true of recently published statistics on administrative copyright infringement cases and civil IPR infringement cases.

⁸ In matters involving multiple right holders, please clarify the numbers of U.S., other foreign, and domestic right holders, and if possible the amount of infringing product attributable to each.

⁹ If copyright and/or related rights are involved, please clarify as far as possible whether the products involved were sound recordings, motion pictures, business software, entertainment software, books, journals, databases or other types of products, and the number of copies of each involved. If possible, please identify these by nationality of the right holder. In other matters, please clarify as far as possible the specific type(s) of goods involved in the infringement (*e.g.*, items of apparel, pharmaceuticals, toys, sporting goods, consumer electronic devices, cigarettes).